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No. 08- 08-839

IN THE

Supreme Court of the United States

JANICE M. HORNOT,

Petitioner,

v.

LEONARD CARDENAS III,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is there a right under the Fourteenth Amendment's due process guarantee to be represented at trial by retained counsel in civil matters, and was this right violated by the trial court's denial of a continuance to allow the petitioner to replace hired counsel who failed to appear for trial, compelling the petitioner to proceed *pro se*?

2. Is there a right under the Due Process Clause of the Fourteenth Amendment to civil trial by a trial judge free from hostility and appearance of pre-judgment, and was this right violated by the trial court's comments at the commencement of trial that he did not believe the petitioner should take the stand and that he wanted to get the case off his docket?

3. Can a formulation of a cause of action in an initial pleading in a lawsuit, so long as it is pertinent to the legal proceedings, be the basis for liability for defamation, either under this Court's formulation of the absolute privilege for statements in judicial proceedings or under the more qualified privilege employed in other jurisdictions?

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OPINIONS BELOW

The Petitioner respectfully requests that a writ of certiorari issue to review the judgments in this matter rendered by the courts of the State of Louisiana as follows: The opinion of the highest state court to review the merits of this case, the Louisiana First Circuit Court of Appeal, appears at Appendix A to this petition, and is unpublished.[1] The Louisiana First Circuit Court of Appeal's decision affirmed in part the judgment of the Louisiana Nineteenth Judicial District Court for the Parish of East Baton Rouge, at Appendix B to this petition.[2] The Louisiana Supreme Court denied the Petitioner's application for writ of certiorari and review of the Louisiana First Circuit Court of Appeal's decision on September 26, 2008, which denial is at Appendix C to this petition.[3]

STATEMENT OF JURISDICTION

As indicated above, and as shown in Appendix C to this petition, the date on which the Louisiana Supreme Court entered its order denying the Petitioner's application for writs to that Court in this matter was September 26, 2008. The ninetieth day following the

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[1] *Janice M. Hornot v. Leonard Cardenas III*, No. 2007 CA 1489 (La. App. 1st Cir. June 20, 2008).

[2] *Janice M. Hornot v. Leonard Cardenas III*, No. 534,772 (La. 19th Jud. Dist. Ct. Feb. 16, 2007).

[3] *Janice M. Hornot v. Leonard Cardenas III*, No. 2008-C-2131 (La. Sept. 26, 2008).

issuance of that order was December 25, 2008; due to that day being a federal holiday, this Court's closure on December 26, and the following two days falling on weekend days, this petition is due to be filed no later than December 29, 2008. This petition is therefore timely filed under U.S. S. Ct. Rule 13.1, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution First Amendment

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

2. United States Constitution Fourteenth Amendment

> "Section 1. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

The Petitioner, Janice Hornot, is an attorney who has been licensed to practice law in the State of Louisiana for more than twenty-eight years. In March 1996, Ms. Hornot was seriously injured in an automobile accident; subsequently, represented by another attorney, she filed suit in connection with that automobile accident for recovery of damages related to her injuries. After her counsel filed suit on her behalf and conducted initial discovery, Ms. Hornot contacted the Respondent, Leonard Cardenas, to take over her representation.

In October 2001, Mr. Cardenas agreed to represent Ms. Hornot in the automobile accident matter.

As discovery neared a close, the defendants proposed that the parties enter mediation. Mr. Cardenas informed Ms. Hornot that counsel for the defendants had indicated that he had evidence that Ms. Hornot had committed insurance fraud in some way or manner, but Mr. Cardenas did not know the basis for the accusation of insurance fraud. Mr. Cardenas did not relay what information the defendant's counsel had, or might have, to corroborate such an accusation, nor did he investigate the matter further; rather, he informed Ms. Hornot that he would withdraw as her counsel if she did not agree to participate in the proposed mediation. In Spring 2002, Ms. Hornot reluctantly attended the mediation. At the mediation, Mr. Cardenas again related to Ms. Hornot the accusations of insurance fraud, but would not tell her who had leveled the accusation nor any further information about the basis of the accusation; Ms. Hornot, while certain she had done nothing wrong, felt intimidated by the prospect of any civil or criminal charges or investigation that might stigmatize her and harm her professional practice, and so agreed to a settlement amount of $95,000.00. Indeed, her anxiety over the uncorroborated accusations relayed by Mr. Cardenas was so great that she never took action to perfect the final disbursement of the settlement funds. In April 2003, she sought the return of her file from Mr. Cardenas, but only received a copy of file materials, rather than any of the original materials, and noted that certain tax documents that she believed to be part of the file were missing.

In July 2005, Ms. Hornot, acting initially on her own behalf, brought this suit against Mr. Cardenas in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, for causes of action arising from Mr. Cardenas's representation of her in the automobile accident case.[4] Specifically, Ms. Hornot alleged, *inter alia*, that (1) Mr. Cardenas's actions or omissions constituted negligent and intentional infliction of emotional distress; (2) Mr. Cardenas's actions or omissions constituted fraud or suppression of the truth; (3) Mr. Cardenas was not entitled to a fee for his legal services in the automobile accident matter due to fraud or suppression of the truth; and (4) Ms. Hornot was entitled to return of her file from Mr. Cardenas, as well as to the full settlement proceeds from the automobile accident matter.[5] Mr. Cardenas filed a cross-claim seeking his attorneys' fees for his services in the automobile accident matter, and seeking damages for defamation arising from Ms. Hornot's allegations in her lawsuit against him.[6] On August 22, 2006, the trial court held a pretrial conference and set this matter for a two-day bench trial for January 11 and 12, 2007.[7]

Approximately six weeks prior to the trial date, Ms. Hornot contacted Kevin Stockstill, an attorney in Lafayette, Louisiana, regarding representing her at the

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[4] Petition for Damages, R. Vol. 1, pp. 3-5.

[5] Petition for Damages, at ¶¶ 3-9, R. Vol. 1, pp. 3-4.

[6] Answer and Reconventional Demand, R. Vol. 1, pp. 10-12.

[7] Pretrial Order, R. Vol. 1, pp. 75-82.

trial. She met with Mr. Stockstill on December 5, 2006, and he indicated his interest in representing her[8]; Ms. Hornot communicated with Mr. Stockstill more than thirty times throughout the month of December 2006 regarding the possible representation.[9] On January 5, 2007, a Friday six days before trial, Mr. Stockstill's assistant informed Ms. Hornot that Mr. Stockstill would be unable to represent her at trial due to personal issues he was encountering.[10] Ms. Hornot immediately continued her search for counsel to represent her at the trial, and contacted Christopher Alexander on January 8 or 9, meeting with him on January 9, 2007.[11] Mr. Alexander met with Ms. Hornot a second time on January 10, the day before trial was set; at this second meeting, he accepted a $10,000.00 retainer check, and prepared and signed a Motion to Enroll and to Continue Trial.[12] Mr. Alexander, however, advised Ms. Hornot not to file the motion until he had an opportunity to contact Mr. Cardenas's counsel to attempt to settle the case.[13]

The next day, on the morning of the trial, Ms. Hornot spoke with Mr. Alexander via telephone, and he indicated

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[8] R. Vol. 2, p. 119.

[9] R. Envelope 1, H-1.

[10] R. Vol. 2, p. 119.

[11] R. Vol. 2, pp. 119, 122.

[12] R. Vol. 2, pp. 122-23.

[13] R. Vol. 2, pp. 122-23.

he was still trying to reach Mr. Cardenas's counsel regarding settlement; Mr. Alexander did not indicate that he would not be attending the trial later that morning.[14] Nevertheless, Mr. Alexander failed to show up at the court for trial. At that point, Mr. Cardenas's counsel informed the trial court and Ms. Hornot that he had spoken with Mr. Alexander and that Mr. Alexander would not be attending the trial and would not be enrolling in the matter.[15] Mr. Cardenas's counsel concluded, "So somebody is not being up front with this Court at this point, and I invite you [the trial judge] to ask Mr. Alexander what he told Ms. Hornot this morning."[16]

The trial court then recessed and the trial judge retired to his chambers and called Mr. Alexander via telephone and held an *ex parte*, off-record conversation with him about representation of Ms. Hornot.[17] When the judge returned to the courtroom, he noted on the record that he had spoken with Mr. Alexander and that Mr. Alexander had indicated he had informed Ms. Hornot and Mr. Cardenas's counsel that he had determined he would not be enrolling in the matter and had no intention of participating in the trial of this matter.[18] Mr. Alexander never appeared in court to

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[14] R. Vol. 2, p. 120.

[15] R. Vol. 2, p. 121.

[16] R. Vol. 2, p. 121.

[17] R. Vol. 2, p. 121-22.

[18] R. Vol. 2, p. 121-22.

discuss the circumstances of his representation of Ms. Hornot on the record. Ms. Hornot immediately sought the court's permission to take the stand to testify as to her attempts to retain representation for trial, and specifically her discussions with Mr. Alexander. The trial judge indicated his predisposition to not believe Ms. Hornot's testimony, responding, ***"I'd be very cautious about taking the stand, Ms. Hornot."***[19]

Ms. Hornot and the trial judge then engaged in a colloquy regarding Mr. Alexander's absence, concluding with Ms. Hornot's request for a continuance of the trial:

> **Ms. Hornot:** . . . I understood that he was going to be here this morning. I am not in a position to represent myself, Your Honor. I was not aware that he was not going to be here. I gave him a retainer check. He did not ask me to sign a contract, but I gave him the retainer check, which he accepted. I am literally caught between a rock and a hard place. . . . I'd like to proffer into evidence in support of my verbal motion for continuance this morning copies of the e-mails that I sent to Kevin Stockstill. . . .[20]

This motion for continuance was Ms. Hornot's first motion to continue the trial. She continued to urge, in rambling fashion, her grounds for continuance, proffering evidence of her communications with

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[19] R. Vol. 2, p. 122.

[20] R. Vol. 2, p. 123-24.

Mr. Stockstill, as well as the signed, albeit un-filed, motion to enroll and for continuance that Mr. Alexander had provided to her.[21] The trial court denied the motion to continue.[22] The trial court then denied a stay of the proceedings for Ms. Hornot to file an emergency supervisory writ to the appellate court to review the denial of her continuance motion.[23] Knowing that the trial was scheduled for two days, Ms. Hornot responded to the denial of the stay request by asking, "Your Honor, is there any way that you would grant me a continuance ***just until this afternoon to start***?" The trial judge responded, "No, ma'am. It is time to get this matter off my docket."[24]

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[21] R. Vol. 2, p. 122-25. Ms. Hornot's unfocused argument for continuance illustrates how unsuited she was to represent herself at trial, and her reliance on the supposed representation by Mr. Alexander:

> Okay. Your Honor, Your Honor, I've been an attorney for 26 years. I went to Catholic school for 13 years. I've been practicing in the Baton Rouge area for 26 years. I have never made statements about people that I believe are untrue or false. ***I'm not sure exactly what's happening.*** I had a good-faith belief that Mr. Alexander was going to be here this morning. He did not tell me he would not be representing me. I was under the impression that he was trying to work this out with Mr. Saunders. ***I do not – you know, other than what Your Honor is telling me, I do not know why he's not here.***

R. Vol. 2, p. 125 (emphasis added).

[22] R. Vol. 2, p. 132.

[23] R. Vol. 2, p. 132.

[24] R. Vol. 2, p. 132 (emphasis added).

After a five-minute break, the court proceeded with trial, and Ms. Hornot again pressed the court to continue at least to the next day (a date that was also scheduled for the trial), concluding by explicitly urging the justice and fairness issues at the heart of the instant petition to this Court for writ of certiorari:

> **Ms. Hornot:** . . . I can't go forward today. I simply cannot. I relied on the representations made by Mr. Alexander to me in good faith. I am not –
>
> **The Court:** Ms. Hornot, I'm not revisiting that issue again. I've already told you, even if Mr. Alexander was here and sitting at counsel table and asking this Court for a continuance based upon his enrollment, I would have denied the motion to enroll at this late date, and I definitely would not have granted a continuance on that ground. I'm through talking about that. Okay?
>
> **Ms. Hornot:** Okay. Your Honor, I need him with respect to the direct exam and the cross-exam, and he has some of my documents, Your Honor. Please. Your Honor, he has my documents. I can't go forward without being prepared. I relied in good faith upon the fact that I gave him the retainer. He did sign an original of the motion to enroll.
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> **The Court:** You keep telling me the same things over and over again, Ms. Hornot.

> **Ms. Hornot:** I know, Your Honor, but in the interest of justice, in the interest of fairness, please don't make me go forward. I'm not prepared to go forward. Truly, Your Honor, I cannot go forward. I have not – I don't have a problem with telling the truth. I don't have a problem with taking the stand, but I cannot act as my own attorney, Your Honor.[25]

The district court rejected Ms. Hornot's entreaties and the trial commenced. That same day, without need to go into the second scheduled day for trial, and following testimony by only Ms. Hornot and Mr. Cardenas, the district court announced oral reasons for judgment finding that none of Ms. Hornot's claims had merit; that the allegations of Ms. Hornot's lawsuit were defamatory *per se* as to Mr. Cardenas; that Mr. Cardenas was entitled to $20,000.00 in damages from the defamation; that Mr. Cardenas was entitled to full payment from the auto accident settlement proceeds of a 17.5-percent contingent fee, plus expenses; and that Ms. Hornot, despite no separate motion for sanctions or hearing as to sanctions, was liable for sanctions in the amount of $10,000.00 under Louisiana Code of Civil Procedure article 863.[26] Final written judgment was entered by the district court on February 26, 2007.[27]

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[25] R. Vol. 2, p. 133.

[26] R. Vol. 1, pp. 302-08, Appendix 3, at pp. 24a-29a. La. C.C.P. art. 863 is substantively equivalent to Fed. R. Civ. P. 11. The Louisiana First Circuit Court of Appeal vacated the award of sanctions upon finding that the article's hearing requirement was not met, and remanded to the district court to hold such a (Cont'd)

Ms. Hornot appealed (now represented by counsel) to the Louisiana First Circuit Court of Appeal, arguing that the district court's failure to grant her motion for continuance was manifestly unfair in that it forced Ms. Hornot to move forward on a *pro se* basis even though she had diligently sought to retain hired counsel to represent her at trial[28]; and that the trial court should not have found her lawsuit to have presented defamation in the face of at least a qualified privilege attaching to allegations made in a judicial proceeding.[29] In arguing the unfairness of the trial court's actions with regard to the motion for continuance, Ms. Hornot also argued to the Court of Appeal the apparent bias and hostility in the trial judge's demeanor.[30] The Louisiana First Circuit affirmed these portions of the district court's rulings and judgment, holding with regard to the motion for continuance that the district court was acting within its discretion; and with regard to the finding of defamation *per se* that the district court was not wrong in finding

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(Cont'd)
hearing. The sanctions order, therefore, is not part of the ruling before this Court in this petition, though it is still a live issue in the district court and its resolution will likely be impacted by the disposition of this petition.

[27] R. Vol. 1, pp. 105-06, Appendix B, at pp. 21a-23a.

[28] *Hornot v. Cardenas*, No. 2007 CA 1489 (La. App. 1st Cir.), Plaintiff's Application for Rehearing, at p. 6.

[29] Appendix A, at pp. 14a-15a.

[30] *Hornot v. Cardenas*, No. 2007 CA 1489 (La. App. 1st Cir.), Plaintiff's Application for Rehearing, at pp. 4-6.

that there was no factual basis for Ms. Hornot's allegations against Mr. Cardenas.[31] After full briefing of these issues by Ms. Hornot on application for writs of certiorari and review, the Louisiana Supreme Court denied writs on September 26, 2008.[32]

REASONS FOR GRANTING THE PETITION

The Louisiana First Circuit Court of Appeal's ruling on the merits in this matter, affirming the district court's denial of Ms. Hornot's motion for continuance and affirming the district court's finding of defamation *per se* by Ms. Hornot in her allegations in her lawsuit against Mr. Cardenas, presents conflicts with due process decisions by this Court and the U.S. Courts of Appeals, and presents a significant unresolved issue regarding First Amendment-based privilege from defamation liability that should attach to pleadings in judicial proceedings.[33] Taken as a whole, the egregious constitutional violations present in the Louisiana courts' actions shock the conscience as to the rights citizens should be entitled to enjoy in resolving disputes through the judicial system. A citizen should be able to be heard by a non-biased, non-hostile tribunal, should be allowed

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[31] Appendix A, at pp. 12a, 15a.

[32] Appendix C, at p. 30a.

[33] *See Hicks v. Feiock*, 485 U.S. 624, 629 (1988) (noting grant of certiorari in the face of denial of review by state supreme court); *see also Foucha v. Louisiana*, 504 U.S. 71 (1992) (noting grant of certiorari to resolve due process issues arising from conduct of state civil proceedings).

to be represented by retained counsel of their choice before that tribunal, and should not be subject to defamation liability just for failing to prevail before the tribunal (especially when that failure may well have been rooted in the due process violations of the tribunal's hostility and in being compelled to proceed *pro se*).

A. Review is Warranted to Resolve a Conflict Between the Louisiana Court's Decision and Decisions of this Court and of the U.S. Courts of Appeals Regarding the Constitutional Guarantees Related to Retention of and Representation by Hired Counsel in Civil Proceedings.

The right to representation by retained counsel in civil proceedings has its genesis in this Court's decision in *Powell v. Alabama*, 287 U.S. 45 (1932). Examining specifically the question of the right to representation by counsel in a criminal case, this Court observed the due process foundations of such a right:

> It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. . . . What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party

> asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.

Id. at 68-69. Then, clarifying that such a right was not limited to the criminal context before it, the *Powell* Court held that,

> [i]f in any case, ***civil or criminal***, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore of due process in the constitutional sense.

Id. at 69 (emphasis added).

This Court has specifically applied this holding as a basis to find constitutional error in the denial of a motion for continuance to allow retained counsel to be present in court. In *Reynolds v. Cochran*, 365 U.S. 525 (1961), a habeas petitioner challenged his confinement in Florida prison under that state's "second-offender" statute. *Id.* at 529. After serving prison sentences for two unrelated convictions, the petitioner had been arrested and brought to court for trial under the second-offender statute on the basis of the two prior convictions. The petitioner informed the court that his counsel had been contacted and would arrive later in the morning on the day of the trial; the trial court responded, "[Y]ou do not need counsel in this case. . . . No point in calling a Doctor to a man already dead." *Id.* While the petitioner raised

issues in his habeas petition regarding double jeopardy and *ex post facto* prohibitions, this Court instead reversed the denial of habeas relief

> for a hearing in order to afford petitioner an opportunity to prove his allegations with regard to another constitutional claim – that ***he was deprived of due process by the refusal of the trial judge to grant his motion for a continuance in order that he might have the assistance of the counsel he had retained*** in the proceedings against him.

Id. at 530 (emphasis added). The *Reynolds* Court based this holding in the pronouncement from *Powell*. *Id.* at 530-31.

Several years later, this Court moved its right-to-retained-counsel analysis expressly into the civil sphere, in *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, this Court held that administrative proceedings by New York state and city officials to remove an AFDC-recipient from the benefits program must include a pre-termination hearing and that, at such hearing, "the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." *Id.* at 270-71 (citing *Powell*, *supra*).

By the time of this Court's opinion in *Maness v. Meyers*, 419 U.S. 449 (1975), "[t]he right to be advised by retained counsel in a civil proceeding" had become a

concisely articulated right recognized by members of the Court. *See id.* at 472 (Stewart, J., concurring). In *Maness*, a civil proceeding regarding an order of contempt levied against an attorney, Justice Stewart concurred in the Court's reversal of judgment upholding the contempt order, noting that "[t]he 'right to be heard by counsel' is frustrated equally ***by denying the right to have counsel present during trial*** as by preventing counsel, once in the courtroom, from giving good-faith professional advice to his client." *Id.* (emphasis added).

The federal Courts of Appeals have also followed *Powell*'s dictate that the denial of the right to be represented by retained counsel, including in civil proceedings, is a denial of constitutional due process. In a case very similar to Ms. Hornot's situation, the U.S. Sixth Circuit Court of Appeals examined a case where the district court, expressing overt hostility to the plaintiff, allowed a plaintiff's counsel to withdraw two days before trial was set, then denied the plaintiff's request for a twenty-five-day continuance to obtain new counsel, forcing the plaintiff to proceed *pro se*. *Anderson v. Sheppard*, 856 F.2d 741, 742-45 (6th Cir. 1988). The *Anderson* court held that, "[w]hile case law in the area is scarce, the right of a civil litigant to be represented by retained counsel, if desired, is now clearly recognized." *Id.* at 747. Specifically regarding the interplay of the due process right to retained counsel at trial and the discretion normally accorded to a motion for continuance, the Sixth Circuit held,

> [T]he district court abused its discretion in failing to grant [plaintiff] a reasonable time to obtain counsel. While the matter of

> continuance is traditionally within the discretion of the trial judge, ***a myopic insistence upon expeditiousness in the face of justifiable request for delay can render the right to defend with counsel an empty formality.***

Id. at 748 (citations, internal quotation marks, and internal ellipsis in original omitted) (emphasis added).

The District of Columbia Circuit and the Fifth Circuit have also held that the right to retained counsel is a constitutionally guaranteed component of due process. In *American Airways Charters, Inc. v. Regan*, 746 F.2d 865 (D.C. Cir. 1984), then-Judge Ginsburg wrote that a statutory requirement for obtaining a government license prior to obtaining counsel would be an invalid "attempt to deny counsel to a civil litigant" as recognized in *Powell*. *Id.* at 873. In *Texas Catastrophe Property Insurance Association v. Morales*, 975 F.2d 1178 (5th Cir. 1992), the Fifth Circuit held that a Texas statute requiring a pool of insurers to rely exclusively for legal representation on the state's attorney general violated "a constitutionally guaranteed right to retain hired counsel in civil matters, [a right] grounded in the Fourteenth Amendment due process clause." *Id.* at 1180.

The denial of Ms. Hornot's motion for continuance in this matter, upheld by the Louisiana First Circuit Court of Appeal, directly conflicts with this line of decisions from this Court and the federal Courts of Appeals and has resulted in a patent denial of Ms. Hornot's due process rights under the Fourteenth

Amendment. This matter falls fully within the confines of the right to retained counsel as that right has been developed, particularly in this Court's *Reynolds* decision and the Sixth Circuit's *Anderson* decision. In each of those cases, as with Ms. Hornot, the trial court's denial of a motion for brief continuance in order to allow retained counsel to be present or to allow the litigant the opportunity to retain new counsel resulted in the litigant being compelled to proceed *pro se*, with clearly adverse impact on the outcome of the underlying litigation. In direct conflict with the *Anderson* court's handling of the issue of a trial court's discretion in the face of the Fourteenth Amendment guarantee, the Louisiana First Circuit here dispensed with Ms. Hornot's arguments purely on the basis that a "trial court has great discretion in granting or denying a motion for continuance, and its ruling will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion."[34]

Indeed, Ms. Hornot's situation is more egregious in some respects than each of those cases. Here, there is no dispute that Ms. Hornot had retained counsel upon an extended and diligent search, but the trial court did not even require that counsel to appear in court to explain on the record the reason for his non-participation in the trial, instead taking Mr. Alexander's word in an *ex parte*, non-sworn telephone conversation over the word of an officer of the court, Ms. Hornot, appearing in open court, on the record, and prepared to take the stand. While the Sixth Circuit was quick to find constitutional violation in the denial of a twenty-

[34] Appendix A, at 12a.

five-day continuance in the circumstance of withdrawal of counsel two days before trial in *Anderson*, here the trial court denied continuance for even part of one day where the court allowed retained counsel to not appear on the morning of trial. And here, the reason proffered by the trial court for the denied continuance does not stand up to even facial scrutiny, as the trial took less than one day, but had been scheduled on the court's schedule for two days, showing that the partial-day continuance would have had no impact on the court's ability to get the case off its docket.

Accordingly, this case presents an ideal opportunity for this Court to resolve a conflict between the Louisiana court and its own decisions and those of the federal Courts of Appeals. U.S. S. Ct. Rule 10(b), (c). The Louisiana First Circuit's failure to protect Ms. Hornot's due process right to be represented by retained counsel must be remedied to avoid the continuation of a travesty of justice commenced the morning Ms. Hornot walked into the courtroom for the trial of her claims.

B. Review is Warranted to Resolve a Conflict Between the Louisiana Court's Decision and Decisions of this Court and of the U.S. Courts of Appeals Regarding the Constitutional Guarantee to a Non-Hostile and Fair Tribunal.

Due process also requires a fair and non-hostile tribunal. In *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), this Court held that the federal statutory regime regarding assessment and distribution of civil penalties under the Fair Labor Standards Act did not create an impermissible conflict of interest for the adjudicating

administrative body at issue. In arriving at this holding, however, the *Marshall* Court set out the due process-derived framework bearing the neutrality requirement for adjudicative proceedings:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. The requirement of neutrality has been jealously guarded by this Court.

Id. at 242 (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

The Sixth Circuit's *Anderson* opinion recognized that this constitutional requirement of judicial neutrality extended to prohibit comments by the trial judge exhibiting pre-judgment and hostility to the claims of the private litigants before it. 856 F.2d at 746-47. In *Anderson*, during the colloquy between the plaintiff and the trial judge regarding the denial of a continuance to allow the plaintiff to retain new counsel, the trial judge made several comments indicating his hostility, his pre-judgment of the plaintiff's claims, and his desire to just get the case done:

> "If I had my druthers I would start the trial of this case tomorrow morning, but I can't because I have another case I'm trying." . . . "The odds are against you, you know that, don't you?" . . . "If it [the first trial] had gone to the jury, the jury would have sent you down the tube. You got a second chance in this case, in my judgment, on a technicality." . . . "You're gambling here, you're shooting craps."

Id. at 743-44. The court held that, "when a trial judge exhibits the open hostility and bias at the beginning of a judicial proceeding as was exhibited here, it follows that the judgment entered therein ***must be reversed***." *Id.* at 747.

Here, the trial judge exhibited similar open hostility to Ms. Hornot and her claim; as with *Anderson*, this hostility was expressed at the trial's outset during colloquy regarding the need for retained counsel to be present or for new counsel to be allowed to be retained. The trial judge here expressly called into question

Ms. Hornot's veracity when, after his *ex parte* telephone conversation with Mr. Anderson, he cut off Ms. Hornot's offer to take the stand to provide sworn testimony as to her efforts to retain Mr. Alexander by stating, "I'd be very cautious about taking the stand, Ms. Hornot."[35] The trial judge then engaged in a back-and-forth with Ms. Hornot, essentially advocating Mr. Alexander's position on an issue of Ms. Hornot's due process rights and even though Mr. Alexander never sought to provide an on-record explanation of his own: "[He] has no intention of representing you in connection with this matter."[36] Despite the proffered evidence and the testimony Ms. Hornot was prepared to give on the stand on the issue of her diligence in seeking and retaining counsel to represent her at trial, still relying on his *ex parte* communication with Mr. Alexander the trial judge essentially rolled over the facts on the record to place the entire blame for Ms. Hornot's lack of counsel on Ms. Hornot: "You had ample time if you chose to do so to obtain counsel to represent you, and the fact that you waited until December and now January is of no fault of any party but yourself, Ms. Hornot."[37] Ms. Hornot, at the time an attorney of twenty-six years and an officer of the court, with nothing on the record indicating a reason to doubt her veracity, offered to provide sworn testimony to the court, and then to seek a more-than-reasonable amount of time in which to seek remedy for the injustice unfolding in the courtroom. The

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[35] R. Vol. 2, p. 122.

[36] R. Vol. 2, p. 123.

[37] R. Vol. 2, p. 131.

trial judge flatly shut Ms. Hornot down when she tried to avail herself of remedies short of a longer-term continuance, seeking first a brief stay while she took an emergency writ to the Louisiana First Circuit, then seeking a continuance within the scheduled trial period, to later that same afternoon: "You can take a writ, but I'm not going to stay this trial. I'm not staying the trial to take a writ." (Regarding the request for a brief stay). "No, ma'am. It is time to get this matter off of my docket." (Regarding the request for a continuance to that same afternoon).[38]

Intertwined with the due process violation in the trial court's failure to grant the continuance and the resulting compulsion of Ms. Hornot to proceed to trial without retained counsel is the independent due process violation evident in the trial judge's hostility and apparent pre-judgment of her veracity and her claims. In the face of the open hostility and bias, the result – a complete denial of Ms. Hornot's claims, a full grant of the relief requested by her opponent on his cross-claim, and an order of sanctions against Ms. Hornot – is subject to doubt as to whether, indeed, "justice has been done." *Marshall*, 446 U.S. at 242. To the extent this doubt runs in conflict with this Court's decision in *Marshall* and the Sixth Circuit's decision in *Anderson*, granting of this petition will provide opportunity for this Court to resolve that conflict. U.S. S. Ct. Rule 10(b), (c). More importantly, to the extent this Court has not yet expressly extended its neutrality-of-adjudication holdings to the situation of judicial hostility, this case would provide the ideal

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[38] R. Vol. 2, p. 132.

vehicle to explore the efficacy of doing so. U.S. S. Ct. Rule 10(c).

C. Review is Warranted to Resolve Whether the First Amendment Requires a Privilege From Defamation Liability for Pleadings in Judicial Proceedings, and, if so, to Determine the Minimum Protections of Such a Privilege.

The damages awarded against Ms. Hornot in this matter based on the trial court's finding of defamation *per se* were based entirely on Ms. Hornot's allegations in her lawsuit against Mr. Cardenas. The Louisiana First Circuit rejected the application of a privilege to protect Ms. Hornot's speech in allegations made in pleadings in judicial proceedings, holding, "[W]e cannot say that the trial court's finding that there was no factual basis for any of the allegations made by Ms. Hornot was wrong."[39] The Louisiana First Circuit articulated the scope of the privilege it was examining as whether the allegations Ms. Hornot made were "based on her good faith, reasonable belief that they were true or made without malice."[40]

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), this Court made clear that, under either the "English Rule" or the "American Rule," statements in judicial proceedings were subject to an absolute privilege:

> The immunity of parties and witnesses from subsequent damages liability for their

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[39] Appendix A, at 15a.

[40] Appendix A, at 15a.

> testimony in judicial proceedings was well established in English common law. Some American decisions required a showing that the witness' allegedly defamatory statements were relevant to the judicial proceeding, but once this threshold showing had been made, the witness had an absolute privilege. The plaintiff could not recover even if the witness knew the statements were false and made them with malice.

Id. at 330-31 (internal citations and footnotes omitted); *see also* Restatement 2d of Torts § 587 ("A party to a private litigation . . . is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding."). In discussing the relative lack of distinction between the English and American rules, the *Briscoe* Court specifically examined those jurisdictions requiring a showing that the judicial proceedings statements were in good faith in order to qualify for a privilege: "Although some cases use the words 'good faith,' good faith was established . . . if the statements were pertinent and material to the judicial proceeding and given in response to questions. Indeed, even if the testimony was not pertinent, ***the [defamation claim] plaintiff had the burden of proving bad faith***." *Briscoe*, 460 U.S. at 331 n.11.[41]

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[41] The leading Louisiana case regarding the qualified privilege applied in this civil law jurisdiction comports with (Cont'd)

Accordingly, even if the Louisiana First Circuit's formulation of the privilege applicable in Louisiana is correct, that it requires a "good faith" belief, that formulation is in conflict with the *Briscoe* Court's examination of what "good faith" requires for purposes of the privilege from defamation liability: materiality to the judicial proceeding. The question is not, as the Louisiana court here put it, whether Ms. Hornot could produce sufficient evidence to support the allegations,[42] but whether the allegations were pertinent and material to the proceedings. Here, Ms. Hornot's allegations all stemmed directly from Mr. Cardenas's representation of her in the personal injury matter, and related to her good faith belief in the harms she suffered arising from that representation. Such testimony, whether the district court ultimately finds it sufficient to prevail on the claims brought through those allegations, should clearly suffice to invoke the privilege from defamation liability. The Louisiana First Circuit's holding that it was not is in conflict with *Briscoe*, and is therefore a solid basis for granting certiorari. U.S. S. Ct. Rule 10(c).

(Cont'd)

the *Briscoe* Court's understanding of the limited "good faith" requirement: "[A]n attorney in Louisiana cannot make disparaging statements, either in pleadings, briefs or argument, ***if the defamatory statements are not pertinent to the case or are made maliciously or without reasonable basis***." *Freeman v. Cooper*, 414, So. 2d 355, 359 (La. 1982) (emphasis added).

[42] Indeed, in light of the trial judge's disallowal of Ms. Hornot's requests to have time to retain new counsel or, at the very least, retrieve documents that she had provided to Mr. Alexander upon her belief that he was going to represent her at the trial of this matter, Ms. Hornot's inability to meet such a standard was essentially guaranteed from the outset.

The zero-sum analysis imposed by the Louisiana court here essentially requires a plaintiff to be successful in proving the allegations of her complaint or face liability for defamation. Such a chilling effect on the seeking of redress in the courts should run afoul of the First Amendment's free speech guarantees. *See Imbler v. Pachtman*, 424 U.S. 409, 426 n.23 (1976):

> In the law of defamation, a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding. In the case of lawyers the privilege extends to their briefs and pleadings as well. . . . Chief Justice Shaw expressed the policy decision as follows: "Subject to this restriction [of relevancy], it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel ***full freedom of speech***, in conducting the causes and advocating and sustaining the rights, or their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions."

(quoting *Hoar v. Wood*, 44 Mass. 193 (1841)) (emphasis added). To the extent that the current scope of the judicial proceedings privilege is defined as a prudential matter and has not been explored by this Court for its constitutional scope, granting certiorari in this matter would enable the Court to take up this task. U.S. S. Ct. Rule 10(c).

CONCLUSION

Ms. Hornot respectfully requests that this Court grant this petition for writ of certiorari. The decision of the Louisiana First Circuit Court of Appeal, allowed to stand by the Louisiana Supreme Court, conflicts with the decisions of this Court and with the decisions of the U.S. Courts of Appeals with regard to the Fourteenth Amendment due process guarantees to be represented by retained counsel in civil proceedings, and to be free from a hostile or biased adjudication of private rights. Moreover, the Louisiana First Circuit's decision provides the opportunity for this Court to examine the First Amendment foundation for, and the appropriate scope of, a privilege (whether "absolute" or "qualified") from defamation liability for allegations made in judicial proceedings. The attention of this Court is merited on each of these issues.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE STATE OF LOUISIANA COURT OF APPEAL, FIRST CIRCUIT FILED JUNE 20, 2008

COURT OF APPEAL OF LOUISIANA FIRST CIRCUIT

Janice M. HORNOT

v.

Leonard CARDENAS III.

No. 2007 CA 1489.

June 20, 2008.

Before WHIPPLE, GUIDRY, GAIDRY, McCLENDON, and HUGHES.

GUIDRY, J.

This case arises out of a claim by a personal injury client against her former attorney for alleged actions and/or omissions designed to cause her emotional and mental distress and anguish, for fraudulent acts, and for return of documents, pleadings, papers, deposition transcripts, and funds in defendant's possession relating in any manner to the case in which defendant represented plaintiff. Defendant attorney, Leonard Cardenas, reconvened alleging that he was entitled to attorney fees and out-of-pocket expenses in connection with his representation of plaintiff in the underlying

personal injury action, and that he was entitled to general and special damages for plaintiff's intentional infliction of emotional distress and defamation of him. Plaintiff appeals a trial court judgment maintaining defendant's reconventional demands and additionally imposing sanctions against her pursuant to La.Code Civ. P. art. 863.[1] For the following reasons, we affirm in part and vacate and remand in part.

FACTS AND PROCEDURAL HISTORY

Janice Hornot, an attorney, was injured in an automobile accident that occurred in March 1996. In approximately October 2001, she contacted Mr. Leonard Cardenas to represent her in connection with that accident. Previously, Ms. Hornot was represented by another attorney who filed suit on her behalf and conducted preliminary discovery.

Mr. Cardenas sent Ms. Hornot a letter dated October 26, 2001, in which he discussed accepting her as a client. Despite acknowledging the many obstacles in her case, which he pointed out defendants would assuredly use to their advantage,[2] Mr. Cardenas

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1. Plaintiff does not appeal that portion of the trial court judgment that dismisses all of her claims.

2. These obstacles were noted to be:

1) Reporting no injury to the investigating police officer;

(Cont'd)

expressed a belief that her claims were legitimate and a willingness to represent her after a thorough review of all file materials. Moreover, Mr. Cardenas expressed a willingness to accept a discounted contingency fee.

Mr. Cardenas sent Ms. Hornot another letter on October 30, 2001, to discuss the issues raised in the recent deposition of Dr. Steven Bailey, a neurosurgeon that Ms. Hornot had seen on two occasions. As expected, the defense attorney asked the doctor to assume certain things, including Ms. Hornot's extensive medical history, the fact that she did not initially report an injury in connection with this accident, and that she did not seek medical treatment for an extended period of time. With all the assumptions, Dr. Bailey testified that he could in

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(Cont'd)

> 2) Failing to receive any medical attention or treatment for approximately fifteen months after the accident;
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> 3) Having two intervening accidents before receiving medical treatment, one involving a fall and the other a rear-end accident about one month prior to her first medical visit following the subject accident;
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> 4) An extensive preexisting medical history, including prior cervical fusion and the degenerative and progressive nature of that condition; and
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> 5) An apparent diagnosis of carpal tunnel syndrome prior to this accident.

no way relate Ms. Hornot's symptoms of which she complained to the March 1996 automobile accident. Mr. Cardenas raised concerns that Ms. Hornot's expectations concerning the case may not be realistic, and he requested that she give some serious consideration to an amount of money that she would accept in settlement of the matter.

In a letter to Ms. Hornot dated January 10, 2002, Mr. Cardenas again discussed the possibility of settling her personal injury case. He stated that "I believe that the insurance company may be willing to pay up to, but probably no more than, $100,000 if we push the matter." He suggested making a settlement demand of $185,000.00. Mr. Cardenas also addressed his proposed fee. He stated "as a professional and personal courtesy and favor to you, I am willing to reduce my fee to 17.5% of the gross amount recovered." Mr. Cardenas requested that Ms. Hornot sign and date the letter if the strategy and fee agreement were acceptable to her.[3]

Ms. Hornot testified that she gave Mr. Cardenas verbal authority to make a settlement offer of $200,000.00. She also verbally agreed to a contingency fee of 17.5%. Thereafter, Mr. Cardenas advised Ms. Hornot that the defense attorney in the personal injury litigation was not interested in responding to the settlement offer at that point, but would rather take the case to mediation.

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3. Ms. Hornot neither signed nor returned the copy of the letter.

Ms. Hornot was reluctant to mediate her claims. In a voice mail that Ms. Hornot left for Mr. Cardenas, she indicated that she would not attend mediation unless the defendant would bear the entire cost of the mediation, and she also felt that everyone was "ganging up" on her. In response to the voice mail, Mr. Cardenas sent Ms. Hornot a letter dated March 12, 2002. Mr. Cardenas expressed increasing concern that he would not be able to represent Ms. Hornot to her satisfaction. In that letter, he advised Ms. Hornot that if he did not hear from her within two days, he would withdraw from his representation of her. Ultimately, Ms. Hornot agreed to attend the mediation with Mr. Cardenas as her counsel. Ms. Hornot's personal injury claim was settled at the mediation for $95,000.00.

After the mediation, Ms. Hornot essentially avoided Mr. Cardenas' requests to come to his office to execute the release and receipt in order for him to disburse the settlement funds. Mr, Cardenas wrote to Ms. Hornot on more than one occasion to inform her that defense counsel was in the process of filing a Motion to Enforce the Settlement and, ultimately, the motion was filed. In correspondence dated July 12, 2002, Mr. Cardenas urged Ms. Hornot to contact him immediately or he would withdraw as counsel.

At trial, Ms. Hornot testified that she felt coerced into attending mediation. Ms. Hornot testified that over the course of the attorney-client relationship, Mr. Cardenas informed her that that there was talk or mention of "insurance fraud" against her by defense

counsel. This allegedly arose from the fact that Ms. Hornot gave testimony in a deposition to the effect that she did not seek treatment for the injuries she allegedly sustained in the accident for some twenty-two months, because she did not have health insurance and did not want to create a preexisting medical condition for insurance purposes. Ms. Hornot testified that although she knew that she had not committed insurance fraud, she was very concerned about the allegations and felt that the mediation would be unfair. She also testified that she asked Mr. Cardenas to propound discovery concerning the allegations to ascertain the basis for them. Ms. Hornot testified that she was distressed to learn that Mr. Cardenas had not investigated the insurance fraud allegation prior to the mediation, but she conceded that Mr. Cardenas himself had never accused her of committing insurance fraud. However, she testified that she felt constantly distressed about this unsupported allegation looming out there. Ms. Hornot testified that Mr. Cardenas pressured her into mediation and essentially used the allegations of insurance fraud as leverage to get her to settle the case.

On the issue of Mr. Cardenas' entitlement to attorney fees in connection with his representation of her in the personal injury litigation, Ms. Hornot testified that she did not feel that Mr. Cardenas should be entitled to collect a legal fee because he breached the duty of good faith and fair dealing towards her by failing or refusing to investigate and/or clarify the source of the insurance fraud allegations made against her. Yet, Ms. Hornot later testified that the 17.5%

contingency fee was reasonable, and she had expressed acquiescence to it. However, she was adamant that she never gave Mr. Cardenas permission to endorse the settlement check and deposit it into his trust account.

Concerning the allegation that Mr. Cardenas failed to return her papers, pleadings, documents, et cetera, Ms. Hornot reluctantly conceded that she, or someone on her behalf, picked up her file on April 8, 2003, and it contained everything except tax returns. Notably, she was unable to testify with certainty whether Mr. Cardenas was ever in possession of her tax returns.

Mr. Cardenas' testimony concerning the mediation and his representation of Ms. Hornot was entirely different. Mr. Cardenas testified that when he first met Ms. Hornot she was "pretty pitiful," and he thought she needed a lawyer. He testified that she came in crying and desperate and begged him to take her case. Mr. Cardenas further testified that he felt "honored" that another attorney so desperately wanted him to represent her.

On the issue of a contingency fee contract, Mr. Cardenas readily admitted that he erred in not getting a signed contract. However, he was dealing with an attorney, a "sophisticated person," and he never dreamed he would end up in the position of having to fight for his attorney fees. Moreover, he testified that Ms. Hornot gave him express permission to endorse the settlement check and deposit it into his trust account.

Mr. Cardenas testified that he believed that Ms. Hornot voluntarily participated in the mediation and settled her case. Mr. Cardenas believed that mediation was in her best interest because the gap in medical treatment was devastating to her case, and this, coupled with her unsatisfactory or suspicious explanation for why she waited so long to seek medical treatment, was problematic. Mr. Cardenas testified that he did not believe that Ms. Hornot would intentionally seek to conceal her medical history from whatever health care insurer she might obtain, but the statement that she did not want to create a preexisting condition would certainly be utilized against her by any good defense attorney.

Moreover, Mr. Cardenas testified that he never used the term "insurance fraud," nor did the defense attorney. Mr. Cardenas told Ms. Hornot that the defense attorney simply stated that he intended to use her explanation for lack of medical treatment against her. Mr. Cardenas testified that this whole "insurance fraud" thing blew up only after Ms. Hornot decided that she was dissatisfied with the amount of the settlement reached at mediation.

Regarding the $95,000.00 settlement, Mr. Cardenas testified that this was one of the biggest coups he had ever accomplished as a lawyer. He testified that Ms. Hornot praised him all the way back to Baton Rouge from New Orleans and gave him a big hug when she got

out of the car. Mr. Cardenas expressed shock and dismay when Ms. Hornot sued him in Civil District Court in New Orleans.[4]

Mr. Cardenas testified that he felt defamed by the allegations made by Ms. Hornot that accused him of fraud and of harming her in his role as her attorney. Mr. Cardenas testified that his reputation as an attorney is everything to him, and that such allegations have caused him harm and will cause him harm in the future if he seeks public office. Moreover, he was compelled to disclose these two lawsuits to the National Board of Trial Advocacy for certification purposes and to financial institutions that lend him money to finance his practice.

The trial court rendered judgment in favor of Mr. Cardenas and against Ms. Hornot, finding without

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4. Ms. Hornot filed a previous suit against Mr. Cardenas in Orleans Parish seeking declaratory judgment that he made statements accusing her of conduct that was criminal or unethical or sanctionable. Mr. Cardenas reconvened, alleging that the allegations in her complaint were defamatory. The Honorable Ethel Simms Julien declined to issue declaratory judgment in favor of Ms. Hornot and rendered judgment for Mr. Cardenas in the amount of $7,500.00 on the defamation claim. Ms. Hornot appealed the damage award and Mr. Cardenas answered the appeal and claimed that he was entitled to a higher damage award. The Fourth Circuit Court of Appeal affirmed. *See Hornot v. Cardenas*, 2006-1341 (La.App. 4th Cir.10/3/07), 968 So.2d 789. Although the causes of action alleged in the instant suit are different, the nature of the evidence and testimony elicited in the instant case and in the civil district court case appear to be virtually the same.

hesitation that Ms. Hornot did not come remotely close to carrying her burden of proof as to any one of the allegations contained in her petition. Additionally, the trial court held that Mr. Cardenas proved his claim of defamation[5] against Ms. Hornot and awarded him $20,000.00. Finally, the trial court imposed La.Code Civ. P. art. 863 sanctions against Ms. Hornot in the amount of $10,000.00, finding that the mere signing and filing of the pleading in this matter constituted a blatant violation of the provisions of that article.

DISCUSSION

ASSIGNMENTS OF ERROR

Ms. Hornot has raised several assignments of error on appeal. Plaintiff's first three assignments of error allege that the trial court committed manifest error in imposing La.Code Civ. P. art. 863 sanctions, because she was not given reasonable notice of a sanctions hearing, and because a sanctions hearing was not conducted. She further alleges the trial court erred in denying her motion for new trial based on these alleged deficiencies. Logically, we will address plaintiff's remaining assignments of error first and then return to a discussion of Article 863 sanctions.

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5. The trial court found that the allegations contained in Ms. Hornot's pleadings against Mr. Cardenas were clearly defamatory per se. Moreover, the court held that the fact that the allegations were printed in the petition constitutes publication.

Appendix A

Motion to Continue Trial

Ms. Hornot alleges that the trial court erred in denying her motion to continue the trial because: (1) she reasonably believed that an attorney that she contacted would appear to represent her; (2) she was not prepared to go forward with trial on a pro se basis; (3) it was her first request for a continuance; (4) she needed additional time to secure new counsel; and (5) the opposing party would suffer no prejudice by a continuance. Louisiana Code of Civil Procedure article 1601 provides that "[a] continuance may be granted in any case if there is good ground therefor." Therefore, under this article, a continuance rests within the sound discretion of the trial court. *Sparacello v. Andrews*, 501 So.2d 269, 273 (La.App. 1st Cir.1986), *writ denied*, 502 So.2d 103 (La.1987). A trial court must look to the facts of each case when a motion to continue has been requested. Among the factors a trial court considers before granting a continuance are diligence, good faith, and reasonable grounds. *Id.*

Ms. Hornot, an attorney practicing law in excess of twenty years, had signed every pleading in the record as counsel of record. Ms. Hornot moved for a continuance of trial, for the first time, on the morning of trial based on her trial counsel not appearing. Yet, Ms. Hornot admitted on the record that she attempted to hire counsel ***just two days*** prior to trial. Moreover,

she had no authority to enroll this other attorney as counsel of record.[6]

The trial judge denied the motion, noting that even if another attorney had enrolled as counsel of record for Ms. Hornot on the morning of trial, he would not have granted a continuance. Moreover, the court noted that the parties selected the trial date at a pretrial conference on August 22, 2006, and the fact that Ms. Hornot waited over a year after filing her suit to try to obtain counsel was not an exercise in due diligence.

The trial court has great discretion in granting or denying a motion for continuance, and its ruling will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. *Sparacello,* 501 So.2d at 274. Based on the facts and circumstances herein, we find the trial court did not abuse its discretion in denying plaintiff's motion for continuance.

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6. The trial judge placed a call to this attorney, Mr. Alexander, who informed him that Ms. Hornot had first contacted him twenty-four hours previously concerning representation of her in this matter. Mr. Alexander signed a motion to enroll but told her not to file it until he had a chance to review the file. After reviewing the file, he made a decision not to represent Ms. Hornot. Mr. Alexander advised that he communicated this to both Ms, Hornot and Mr. Saunders (counsel for Mr. Cardenas). Mr. Alexander further advised that he was in trial in Iberville Parish that date and could not have been in East Baton Rouge Parish in any event.

Appendix A

Defamation

Ms. Hornot alleges that the trial court erred in finding that the allegations of her petition were defamatory per se to Mr. Cardenas.[7] Defamation is a tort that involves the invasion of a person's interest in his or her reputation and good name. *Fitzgerald v. Tucker,* 98-2313, p. 10 (La.6/29/99), 737 So.2d 706, 715. The elements necessary to establish a defamation cause of action are: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault, requiring negligence or greater, on the part of the publisher; and (4) resulting injury. *Treniecosta v. Beck,* 96-2388, p. 10 (La.10/21/97), 703 So.2d 552, 559 (*citing Restatement (Second) of Torts* § 558 (1977)). A communication is defamatory if it tends to harm the reputation of another so as to lower the person in the estimation of the community or to deter others from associating or dealing with the person. *Id.* (*citing Restatement (Second) of Torts* § 559 (1977)).

In Louisiana, defamatory words traditionally have been classified into two categories: those that are defamatory per se and those that are susceptible of a defamatory meaning. *Costello v. Hardy,* 2003-1146, p. 13 (La.1/21/04), 864 So.2d 129, 140. Words that expressly or implicitly accuse another of criminal

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7. Again, we note that Ms. Hornot has not appealed that portion of the trial court judgment that dismisses her claims finding that she did not come remotely close to carrying her burden of proof as to any of the claims made against Mr. Cardenas.

conduct, or that by their very nature tend to injure one's personal or professional reputation, even without considering extrinsic facts or surrounding circumstances, are considered defamatory per se. When a plaintiff proves publication of words that are defamatory per se, the elements of falsity and malice (or fault) are presumed, but may be rebutted by the defendant. The element of injury may also be presumed. *Costello*, 2003-1146 at pp. 13-14, 864 So.2d at 140.

Defamatory words are, by definition, words that tend to harm the reputation of another so as to lower the person in the estimation of the community, to deter others from associating or dealing with the person, or otherwise expose the person to contempt or ridicule. Words that convey an element of personal disgrace, dishonesty or disrepute are defamatory. *See Fitzgerald*, 98-2313 at p. 11, 737 So.2d at 716. Herein, Ms. Hornot accused Mr. Cardenas, in a public record pleading, of fraud, of suppressing the truth, and of refusing to return her file materials and her funds. The trial court found that such allegations on their face are of the kind that could potentially injure Mr. Cardenas' professional reputation. Moreover, the court determined that the words were false and "clearly, this was done with malice and intent, and . . . with total and unfettered disregard for the truth. . . ."

It is a well-established legal principle that a court of appeal may not set aside a trial court's findings of fact in the absence of manifest error or unless it is clearly wrong. *Ferrell v. Fireman's Fund Insurance Co.*,

94-1252, p. 4 (La.2/20/95), 650 So.2d 742, 745. Based on our review of the record, we cannot say that the trial court was clearly wrong. These words clearly convey an element of dishonesty and impute that Mr. Cardenas lacked integrity or acted unethically. Moreover, we do not find that the trial court committed manifest error in rejecting Ms. Hornot's argument that her allegations were protected by a qualified privilege. Ms. Hornot contends that she cannot be held liable for defamation for allegations made in a judicial proceeding based on her *good faith, reasonable* belief that they were true or made without malice (*citing Freeman v. Cooper*, 414 So.2d 355 (La.1982)). The operative words here are *good faith* and *reasonable.* Based on our thorough review of the record, we cannot say that the trial court's finding that there was no factual basis for any of the allegations made by Ms. Hornot was wrong.

Quantum

Louisiana Civil Code article 2324.1 provides:

In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury.

The assessment of the appropriate amount of damages is a question of fact entitled to great deference on review. *Wainwright v. Fontenot*, 2000-0492, p. 6 (La.10/17/00), 774 So.2d 70, 74. In fact, the discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb an award

of general damages. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1261 (La.1993), *cert. denied*, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994).

At trial, Mr. Cardenas testified that he felt personally damaged and that any political aspirations he may have had may have been damaged. He also expressed humiliation at having to report the lawsuit to the National Board of Trial Advocacy and his financial lenders.

The trial court's award of damages was based on credibility determinations and, of necessity, left largely to discretion. Accordingly, we affirm this award.

Louisiana Code of Civil Procedure Article 863 Sanctions

With respect to the imposition of La.Code Civ. P. art. 863 sanctions, Ms. Hornot alleges that the trial court committed error by not affording her reasonable notice of a hearing, by failing to conduct a sanctions hearing, and by denying her motion for new trial related to this issue.

Appendix A

Louisiana Code of Civil Procedure article 863 provides:

A. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address.

B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but the signature of an attorney or party shall constitute a certification by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact; that it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation.

C. If a pleading is not signed, it shall be stricken unless promptly signed after the omission is called to the attention of the pleader.

D. If, upon motion of any party or upon its own motion, the court determines that a certification has been made in violation of the provisions of this Article, the court shall impose upon the person who made the

certification or the represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

E. **A sanction authorized in Paragraph D shall be imposed only after a hearing at which any party or his counsel may present any evidence or argument relevant to the issue of imposition of the sanction.** [Emphasis added].

F. A sanction authorized in Paragraph D shall not be imposed with respect to an original petition which is filed within sixty days of an applicable prescriptive date and then voluntarily dismissed within ninety days after its filing or on the date of a hearing on the pleading, whichever is earlier.

Under La.Code Civ. P. art. 863(E), no sanctions can be imposed unless there is a hearing first. However, the article is silent with respect to the issue of notice. We have held, however, that due process requires that reasonable notice be given. *Lee v. Woodley*, 615 So.2d 349, 352 (La.App. 1st Cir.), *writ denied*, 618 So.2d 411 (La.1993). Such notice would not have to be in writing, and actual notice would be sufficient. *Id.*

Ms. Hornot contends that the issue of Article 863 sanctions was raised for the first time in closing arguments when counsel for Mr. Cardenas urged the

court to impose Article 863 sanctions against her.[8] Although Mr. Cardenas' reconventional demand generally prays for all relief allowed by law, we note that he did not file a pleading to specifically request Article 863 sanctions. In any event, even assuming Ms. Hornot had actual notice of Mr. Cardenas' intent to pursue sanctions, La.Code Civ. P. art. 863(E) mandates a "hearing" before sanctions may be imposed. We find that Ms. Hornot was not afforded a hearing before sanctions were imposed; therefore, we remand this matter to the trial court for a full evidentiary hearing on the issue of Article 863 sanctions.

CONCLUSION

For the foregoing reasons, we affirm that portion of the trial court judgment denying Ms. Hornot's motion for continuance and awarding plaintiff-in-reconvention, Leonard Cardenas, damages for defamation. The award of Article 863 sanctions is vacated, and this matter is remanded to the trial court for a hearing on the issue of sanctions. The costs of this appeal are assessed equally to Janice Hornot and Leonard Cardenas.

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8. Also pending before this Court is a Motion to Supplement Record on Appeal filed by Ms. Hornot. The motion notes that the record on appeal does not include a transcript of closing arguments, which contains argument concerning Article 863 sanctions. The motion seeks to supplement the record on appeal with the transcript of closing arguments. The motion to supplement is granted.

Appendix A

AFFIRMED IN PART; VACATED AND REMANDED IN PART. MOTION TO SUPPLEMENT RECORD ON APPEAL GRANTED.

HUGHES, J., concurs.

APPENDIX B — JUDGMENT OF THE STATE OF LOUISIANA, 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGH DATED FEBRUARY 16, 2007

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

NUMBER 534,772 DIV. 23

JANICE M. HORNOT

VERSUS

LEONARD CARDENAS III

JUDGMENT

This matter came up for trial held on January 11, 2007, and for hearing on plaintiff's verbal Motion for a Continuance of the Trial. After a consideration of the evidence presented on behalf of the parties and the applicable law, and for those oral reasons rendered,

IT IS ORDERED, ADJUDGED AND DECREED that, the plaintiff/defendant-in-reconvention's Motion for Continuance of Trial is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff/defendant-in-reconvention, Janice Hornot, has failed to carry her burden of proof and,

accordingly, all claims set forth in her Petition for Damages are hereby dismissed, with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of defendant/plaintiff-in-reconvention, Leonard Cardenas III, and the Court hereby authorizes Leonard Cardenas III to withhold an attorney's fee of $16,625.00, reflecting 17.5% of the $95,000.00 settlement secured by Cardenas on behalf of Hornot in connection with his prior representation of her. Cardenas is further authorized to withhold his documented file expenses of $8,324.42. Legal interest shall acrue on these sums from the date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the allegations made by Janice Hornot against Leonard Cardenas III in this action amount to defamation *per se* and, the Court hereby awards Leonard Cardenas III damages in the sum of $20,000.00 plus legal interest until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff/defendant-in-reconvention, Janice Hornot, has violated the provisions of Louisiana Codes of Civil Procedure Art. 863 and hereby awards monetary sanctions against Hornot in the amount of $10,000.00 plus legal interest from the date of judgment, said monetary sanctions payable to Leonard Cardenas III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of these proceedings are hereby assessed against plaintiff/defendant-in-reconvention, Janice Hornot.

Appendix B

Oral reasons rendered in Open Court on the 11th day of January, 2007.

Judgment signed this 26 day of February, 2007.

s/ William A. Morvant
WILLIAM A. MORVANT, JUDGE
19TH JUDICIAL DISTRICT COURT

Respectfully submitted,

CARDENAS & SAUNDERS

s/ Henri M. Saunders
HENRI M. SAUNDERS, LSBA NO. 25236
6525 Perkins Road
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Appendix B

ORAL REASONS RENDERED IN OPEN COURT DATED JANUARY 11, 2007

Oral Reasons

The Court: I am going to start with the plaintiff's case-in-chief. The petition is entitled a "Petition for Return of Documents and Other Relief." Therein, Ms. Hornot sues Mr. Cardenas, claiming that Mr. Cardenas represented her in connection with a personal injury case, and therein he took actions and/or committed omissions, including, but not limited to, fraud, negligent and intentional infliction of emotional distress on Ms. Hornot which caused her damages. She further alleges in paragraphs four through six that she does not feel Mr. Cardenas is entitled to collect any legal fee from her representation in that matter, again, based on allegations of fraud. In paragraph seven, she claims that Mr. Cardenas has in his possession funds — which is not in dispute, all of the exhibits that have been introduced indicate that the settlement funds have been in the client trust account, where they properly should be, since the time of receiving the settlement check up until and through today's date — papers, deposition transcripts, pleadings and other documents relating to the representation of plaintiff, and plaintiff hereby requests the return of all of her funds, papers, depositions, pleadings, other documents, and things of every kind or nature relating in any manner to the case in which Mr. Cardenas represented plaintiff. Than paragraph eight claims that Mr. Cardenas accused her of improper and/or unethical conduct and apparently

did not report her to the Office of Disciplinary Counsel. And that all of these actions have caused her and continue to cause her harm and damage, and that he is liable to her for those losses and damages. This trial began this morning at 9:30. It is now 20 minutes to 4:00. I have listened to a large volume of testimony from plaintiff, the majority of which was in narrative form, and I can state with absolutely no hesitation whatsoever that plaintiff has not even come remotely close to carrying her burden of proof as to any one of these allegations which are contained in her petition, and, in fact, the evidence and testimony that I have heard, contrary to supporting and carrying the burden of proof, reflect that the Court has serious question as to whether or not there was good faith in the filing of this petition. There has been no evidence, no testimony of fraud on the part of Mr. Cardenas in any form or fashion — or anyone else, for that matter. The evidence reflects that contrary to the allegations of paragraph seven, both the documentary evidence and Ms. Hornot's testimony reflect that she did, in fact, receive her entire file back. Her only supposition is she thought that maybe Mr. Cardenas received IRS documents and possibly a deposition of a doctor, which she couldn't identify, and is going strictly on speculation, which Mr. Cardenas testified equivocally that not only did he give her his entire file, but an outside copying service was used to copy the file. So I'm not dependent upon someone in Mr. Cardenas' office picking and choosing what documents were returned. As of April 8 of '03, and I'll note that this petition was filed July 25 of '05, Ms. Hornot had her entire file. The record is also void of any

allegations or any evidence that Mr. Cardenas ever accused Ms. Hornot of any unethical, improper, illegal or any other conduct. So for those reasons, the Court finds plaintiff has failed to meet and carry her burden of proof, and I am going to dismiss the main demand, with prejudice, at plaintiff's costs. As to the answer and reconventional demand, first, I'm going to start with the request for fees based on prior representation, and I'm going to start by saying I do have some problems and it's a problem Mr. Cardenas has acknowledged, the lack of a written contract. And I do understand, based on the testimony of both Ms. Hornot and Mr. Cardenas, that at some point during the course of this representation discussions were made as to a fee that would be charged. It was not reduced to writing. I am assuming at some point Mr. Cardenas must have said that he will handle it under his standard one-third agreement, and the reason I'm saying that is that the letter that has been introduced into evidence indicates that he will — and I don't have that correspondence in front of me, but that he will reduce his standard fee to 17.5 percent, assuming the case settles at that point. My appreciation is that shortly thereafter, without a lot more discovery taking place, we had the mediation, at which point the case was settled. Mr. Saunders, I'm very mindful of your argument that we're now in 2007 and this case still has a breath of life in its lungs; however, in my opinion, that is not a sufficient justification to rise that scale from 17.5, which Ms. Hornot said she did, in fact, agree to and would still agree to this date, to either 33-1/3 or a higher percentage. Therefore, I am going to find that Mr. Cardenas, based on his representation of

Ms. Hornot in that litigation, is entitled to his fee of 17.5 percent, which comes out to — and, Mr. Cardenas, I'm assuming your calculations on this payout were correct — $16,625.00 of the $95,000.00 settlement, in addition to all expenses and payments made, which I think are $8,386.53 less and except the $62.11 which Mr. Cardenas said that he could not find sufficient paperwork to justify. Now, turning to the claim for defamation, the Court finds, first of all, simply on a review of the pleading, that the allegations contained in there are clearly defamatory per se. Ms. Hornot has accused Mr. Cardenas of fraud, of failure to return — various acts of fraud, a failure to return her file, of possibly unethical or improper conduct, suppression of the truth, intentional infliction of emotional distress, The fact that they are printed in this petition constitutes publication. Based on the evidence and testimony that the Court has heard today and based on the rather unique history of this tripart litigation, which includes the personal injury case, case 3-04508, which was the Orleans Parish suit, and the present litigation, clearly, this was done with malice and intent and, I have to say, with total and unfettered disregard for the truth contained in the allegations made in this petition. With regard to the element of damages, Mr. Cardenas has testified that this matter was — language was contained in a lawsuit filed and published here in East Baton Rouge Parish where he is accused by both an attorney and a former client of fraud, that it has and will continue to be an issue that he has to explain to clients, to lending institutions, for his certification for the Trial Advocacy Board, all of which could have and should have been

avoided. Accordingly, on the claim of defamation, the Court finds in favor of Mr. Cardenas that he has met his burden of proof, and I will make an award to Mr. Cardenas in the amount of $20,000.00. In addition, in response to the request for sanctions, article 893 — I'm sorry, 863, regarding signing of pleadings, requires that by signing them you constitute a certification that you have read the pleadings, to the best of your knowledge and information and belief, after reasonable inquiry, they are well founded in fact, warranted by existing law, or in good faith. I have looked at the petition which was signed by Ms. Hornot, and based on the testimony that she has given today, clearly, the signing and filing of this petition, at least in this Court's humble opinion, constitutes a blatant violation of article 863. I would have to go no further than paragraph seven of the petition to support that finding. However, I look back at paragraphs three, four, five and six, alleging various acts of fraud and misrepresentation by Mr. Cardenas, paragraph eight, which alleges that he has accused Ms. Hornot of unethical or improper conduct, or words to that effect, and that has knowledge of accusations of threats made by a defense attorney, and that he has not fully reported, I'm assuming, Ms. Hornot's conduct to the Office of Disciplinary Counsel, which I have to assume Mr. Cardenas did not do because at no time based on his testimony here today did he ever believe that you had committed an act of insurance fraud, but, rather, was only concerned with the explanation which you admitted on cross-examination you gave in a deposition in June of 1998, explaining the 22-month gap between injury and receiving treatment. Based on all of the

evidence and testimony that has been presented here today by plaintiff in support of her case-in-chief, I clearly find that by signing and filing this pleading you violated article 863. Therefore, the Court is going to impose sanctions in the amount of $10,000.00 based on a clear and blatant violation of the provisions of article 863. The award with regard to the defamation case will bear legal interest from date of judicial demand until paid. The Court will also assess —and likewise, the request for legal fees which the Court has awarded will also pear legal interest from date of judicial demand until paid. The only award that will not will be the sanctions. And I will assess plaintiff in the principal demand and defendant-in-reconvention, Ms. Hornot, for all costs of these proceedings. And let me state, that after listening to everything I have heard today, to express my extreme disappointment that a matter such as this rose to the level in which it did requiring litigation, post-settlement litigation in front of Judge Calloway, a judge of the Civil District Court for the Parish of Orleans, and the time spent litigating this matter before me. It simply defies logic that a matter of this nature could not have and should have been resolved long before this suit was filed July 25 of '05. However, those are simply my observations stated in a rhetorical context to which I know there will be no answer or resolution. Anything further before the Court?

Mr. Saunders: No, Your Honor.

The Court: All right. We will stand adjourned until 9:30 tomorrow morning.

* * * * *

APPENDIX C — ORDER OF THE SUPREME COURT OF THE STATE OF LOUISIANA DENYING PETITION FOR REHEARING FILED SEPTEMBER 26, 2008

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 2008-C-2131

JANICE M. HORNOT

VS.

LEONARD CARDENAS III

IN RE: Hornot, Janice M.; – Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of E. Baton Rouge, 19th Judicial District Court Div. E, Nos. 534772; to the Court of Appeal, First Circuit, No. 2007 CA 1489

September 26, 2008

Denied.